RAJENDAR KAUR BAKHTAWAR SINGH

v.

JESWANT SINGH BAKHTAWAR SINGH

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 420 OF 1985]
2 AUGUST 1986

LAND LAW: *Application under s. 327 National Land Code - For removal of private caveat - Entered under s. 323(1)(b) National Land Code - As trustee of company's beneficial interest in land concerned.*

This is an appeal against the High Court decision dismissing the appellant's motion for the removal of a private caveat entered by the respondent against a piece of land in Cheras. The application was made under s. 327 of the National Land Code ("the Code") on grounds that the respondent had no caveatable interest in the said land.

The appellant had purchased the said property from the respondent through King's Agencies Sdn. Bhd., a family company of which both the appellant and the respondent, brother and sister, are directors and shareholders. A sum of RM28,000 was advanced by her father and handed to the respondent by cash and cheques. (Their father from time to time provided financial assistance to the company in the form of loan advances.) The balance of RM66,500 was raised by a loan from the Development & Commercial Bank in the appellant's name by charging The said land with the bank as security. The title deed was registered in the appellant's name on 17 February 1984. She also executed the charge documents as chargor on the same day. The respondent stood as guarantor.

On 16 January 1985, the respondent lodged a private caveat on the land under s. 323(1)(b) of the Code in his capacity as director and agent of the company in order to protect and give notice of the beneficial and equitable interest of the company in the said land. He claimed that the appellant had known at all material times that she held the said land as trustee of the company's beneficial interest and that the land was purchased from the company's own funds.

Held:

[1] Under s. 323(1)(b) of the Code the caveator must show that there is a trust affecting the said land and the company is beneficially entitled under the said trust.

[2] In the present appeal, nothing has been shown of the existence of any trust, express or implied, in favour of the company. There was no resolution by the company at any meeting of its board of directors to purchase the said land. The entry in the title deed shows a direct transfer from the former registered owner to the appellant personally and below that is another entry on the same date showing a charge of the said property to the bank.

[3] The affidavits in the present appeal have not raised any serious question to be tried and the balance of convenience does not favour the *status quo* to be maintained until the trial of the action.

[Appeal allowed with costs. Order that caveat lodged by respondent be removed forthwith.]

Case referred to:
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212

Legislation referred to:
National Land Code 1965, ss. 327, 323, 323(1)(b), 332

For the appellant - G. Krishnan; M/s. Krishnan & Co.
For the respondent - Baharuddeen Abu Bakar; M/s. Baharuddeen & Co.

JUDGMENT

Syed Agil Barakbah SCJ:

The appeal before us is against the decision of the learned Judge of the High Court, Kuala Lumpur, dismissing the plaintiff/appellant's motion for the removal of a private caveat entered by the defendant/respondent against the land held under HS (M) 764, P.T. NO. 4956, Mukim of Cheras, in the state of Selangor (hereinafter called "The Said Land"). The application was made under s. 327 of the National Land Code on the ground that the respondent has no title or interest that would entitle him to caveat the said land. Leave to appeal against the decision was granted by the learned Judge.

The respondent filed a motion before us for extension of time to file a cross-appeal against the decision of the learned Judge who dismissed his preliminary objection on points of law. The points of law raised in the respondent's affidavit in support of the motion for leave need not be considered separately because they refer ultimately to the same issue in this appeal, viz. whether respondent has a caveatable interest in the said land. We decided to proceed with the appeal and directed the Counsel for the respondent, i.e., the caveator, to submit first.

The relevant facts of the case according to the affidavits of the appellant and that of her father were that the respondent and the appellant are brother and sister and both are directors and shareholders of a family company known as King's Agencies Sdn. Bhd. with two other brothers as directors. The company functions as a real estate agent. Their father from time to time provided financial assistance to the company in the form of loan advances. Some time in the early part of January 1983, negotiations and discussions started for the purchase of the said land and a house standing thereon. Finally, the appellant decided to purchase the property through the Agencies at a price of RM95,000. A sum of RM28,500 was advanced by her father and handed to the respondent by cash and cheques and the balance of RM66,500 was raised by a loan from the Development & Commercial Bank (D & C Bank) by charging the said land with the Bank as security. The title deed to the said land was registered in the name of the appellant on 17 February 1984 and the housing loan from the bank was also taken in her name. She also executed the charge documents as chargor on the same day. The respondent stood as guarantor. As she was then living in Ipoh, she requested her brother to manage the property by collecting rents and paying whatever expenses connected therewith. On 21 November 1984, she appointed the respondent as her power of attorney registered on 29 November 1984 as P/A No. 17095/84. On 16 January 1985, the respondent lodged a private caveat on The Said Land under s. 323 of the National Land Code. The statutory declaration supporting the respondent's application for lodging for lodging the caveat at para. 4 states:

STATUTORY DECLARATION

Jeswant Sing s/o Bakhtar Sing (I.C.No. 78762261 of No. 16,5L/4, Petaling Jaya, Selangor, do solemnly and sincerely declare that:

1. ...

2. ...

3. ...

4. The said property was registered in the name of the registered proprietors who are also directors and shareholders of the company as trustees of the company's beneficial interest in and title to the property.

5. ...

6. ...

About six months later on 1 July 1985, the appellant revoked the power of attorney by executing a deed of revocation, a copy of which was handed to the respondent with a covering letter (see pp. 62 to 64, Vol. 3 record of appeal). Further correspondence ensued requesting the respondent to remove the caveat, but to no avail.

The respondent in his affidavit stated that he caveated The said land in his capacity as director and agent of the company in order to protect and give notice of the beneficial and equitable interest of the company in the said land. Furthermore, although the title deed was registered in the appellant's name, the said land was purchased from the company's own funds generated from its business activities. It was within the knowledge of the appellant at all material times that she held the said land as trustee of the company for its beneficial and equitable interest in the land.

He further stated that the sale and purchase agreement of the said land was valid and genuine, but the appellant's status as purchaser was subject to the averment stated above. In short, the respondent claimed that the company has a caveatable interest and therefore a right to lodge a caveat in the said land.

The sole question is whether these are sufficient to entitle the respondent to lodge a caveat under s. 323(1)(b) of the National Land Code. The section states:

Section 323(1). The persons and bodies at whose instance a private caveat may be entered are:

(a) ...

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest:

(c) ...

Under this sub-section, the caveator must show that there is a trust affecting The said land or interest in the said land and the company is beneficially entitled under the said trust.

At this stage however in view of the conflicting affidavit evidence, the duty of the trial Judge is to ascertain whether there is a serious question to be tried and that such conflict of evidence need not be disposed of by affidavit evidence only. (see *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 @ 216).

In the present appeal, nothing has been shown of the existence of any trust, express or implied, as alleged in the affidavit in favour of the company. Clearly, the respondent's assertion at para. 4 of his statutory declaration that "the alleged property were registered in the names of the registered proprietors who are also shareholders and directors of the company as trustees of the company's beneficial interest in and title to the property" cannot

be true since it is materially contradicted by his own admission that the property is registered in the name of the appellant. There was no resolution by the company at any meeting of its board of directors to purchase the said land. The entry in the title deed shows a direct transfer from the former registered owner to the appellant personally and below that is another entry on the same date showing a charge of the property by the appellant to the D&C Bank Bhd. (See p. 48 of the appeal record, Vol. 3). No trust caveat has been lodged under s. 332 of the National Land code to indicate that the property is being held by the company in trust.

For the reasons stated above, we do not consider the affidavits in the present appeal have raised any serious question to be tried and the balance of convenience does not favour the *status quo* to be maintained until the trial of the action.

We therefore allow the appeal with costs here and the Court below and make an order that the caveat lodged by the respondent be removed forthwith.

With regard to the cross-appeal, as indicated at the earlier stage, we make no order.

Deposit to be returned to the appellant.

Also found at [1987] 1 CLJ 468